Editor's note: 82 I.D. 68

UNITED STATES

v.

CLARION W. TAYLOR, SR., AND

GERALD O'CONNOR

IBLA 74-182 Decided February 20, 1975

Appeals from the decision of Administrative Law Judge Robert W. Mesch dismissing the contest complaint against the Ute Park No. 1 placer claim in Colorado Contest 499.

Reversed.

1. Mining Claims: Common Varieties of Minerals: Generally -- Mining Claims: Determination of Validity -- Mining Claims: Discovery: Marketability -- Surface Resources Act: Generally

The Surface Resources Act of July 23, 1955, declared that common varieties of sand and gravel are not valuable mineral deposits under the mining laws. In order for a claim for such material to be sustained

as validated by a discovery, the prudent man-marketability test of discovery of a valuable mineral deposit must have been met at the date of the Act, and reasonably continuously thereafter.

2. Mining Claims: Discovery: Marketability

The marketability refinement of the prudent man test of discovery requires that the mineral locator must show that by reason of accessibility, bona fides in development, proximity to market, existence of present demand, and other factors, the mineral deposit is of such value that it can be mined, removed and disposed of at a profit.

3. Administrative Procedure: Administrative Law Judges -- Contests and Protests: Generally -- Mining Claims: Hearings -- Rules of Practice: Hearings

While a mining contest is within the jurisdiction of an Administrative Law Judge, he may reopen the hearing for the production

of further evidence before he makes his decision.

4. Contests and Protests: Generally -- Evidence: Burden of Proof -- Mining Claims: Contests -- Rules of Practice: Evidence -- Rules of Practice: Government Contests

The ultimate burden of proof to show a discovery of a valuable mineral deposit is always upon the mining claimant. However, if the Government in a mining contest fails to present a prima facie case and the contestees move to dismiss the case and rest, the contest complaint must be dismissed because there would be no evidentiary basis for an order of invalidity.

5. Evidence: Generally -- Mining Claims: Contests -- Mining Claims: Hearings --Rules of Practice: Evidence -- Rules of Practice: Government Contests

In determining the validity of a mining claim in a Government contest, the entire evidentiary record must be considered;

therefore, if evidence presented by the contestees shows that there has not been a discovery, it may be used in reaching a decision that the claim is invalid because of a lack of discovery, regardless of any defects in the Government's prima facie case.

6. Evidence: Burden of Proof -- Mining Claims: Contests -- Rules of Practice: Evidence -- Rules of Practice: Government Contests

Where the Government has made a prima facie case of lack of discovery in a mining contest, any issue in doubt as to discovery raised by the evidence must be resolved against the party having the risk of nonpersuasion, the mining claimant. If a mining claimant fails to show by a preponderance of the evidence as to such issue that there has been a discovery of a valuable mineral deposit he has not satisfied his burden of proof and an Administrative Law Judge must declare the claim invalid, rather than

leave the question of the claim's validity unresolved.

7. Administrative Procedure: Hearings -- Contests and Protests: Generally --Mining Claims: Contests -- Mining Claims: Determination of Validity -- Mining Claims: Hearings -- Rules of Practice: Government Contests

Where a contestee in a mining contest preponderates sufficiently to overcome the Government's prima facie case on an issue raised by the evidence in a mining contest and there is no evidence on other essential disputed issues, the contest should be dismissed unless a patent application is being contested, in which case a further hearing must be ordered to resolve other essential issues to determine whether the application may be allowed.

8. Evidence: Burden of Proof -- Mining Claims: Discovery: Marketability

In making a prima facie case in a mining contest involving a common variety of

material, it is only essential for the Government to establish that the contestees had not prior to July 23, 1955, met the criteria used in determining marketability at a profit. It is not essential that the Government's evidence prove conclusively that the material could not, in fact, be marketed at a profit, but only that it was not sold or marketed. The Government is not required to do the discovery work upon a mining claim; it is only necessary that the exposed areas of a claim and the workings on a claim be examined to verify if a discovery has been made by the mining claimant.

9. Mining Claims: Common Varieties of Minerals: Generally -- Mining Claims: Discovery: Marketability

In determining the marketability of a common variety of sand and gravel from a mining claim, the possibility that the material could be sold for purposes for

which ordinary earth may be used may not be considered, as such purposes are not validating uses cognizable under the mining laws.

10. Mining Claims: Common Varieties of Minerals: Generally -- Mining Claims: Discovery: Marketability

A mining claim located for a common variety of gravel prior to the Surface Resources Act of July 23, 1955, cannot be sustained as being held as a reserve for the gravel deposit where the claimants had not established a discovery under the marketability test at that time. The "reserve rule" is not a substitute for discovery. A mining claimant's desire to hold a claim in hope that there will be an increase in the market demand and price does not satisfy the marketability test.

11. Evidence: Credibility -- Mining Claims: Discovery: Marketability

A conjectural opinion on the possibility of a mining claimant's ability to market

a common variety of gravel at a profit prior to July 23, 1955, is not credible evidence of marketability where specific evidence tends to show that development of a mining operation at that time was not then warranted by the market place conditions.

APPEARANCES: Michael J. Frederick, Esq., of Ross and Frederick, Colorado Springs, Colorado, for appellant-contestees; Rogers N. Robinson, Esq., Office of General Counsel, Department of Agriculture, Denver, Colorado, for appellant-contestant.

OPINION BY ADMINISTRATIVE JUDGE THOMPSON

The Bureau of Land Management, acting at the request of the Forest Service, Department of Agriculture, filed a contest complaint against the contestees' Ute Park No. 1 and Ute Park No. 2 placer mining claims, located in section 9, T. 13 S., R. 68 W., 6th P.M., about eight miles northwest of Colorado Springs in Pike National Forest, Colorado. The complaint, as amended, alleged: (1) that no valuable mineral deposits have been discovered on the claims; (2) that the lands are non-mineral in character; and (3) that the material on the claims is a common variety of rock within the meaning of section 3 of the Act of July 23, 1955, 30 U.S.C. § 611 et seq. (1970).

Following the filing of an answer to the complaint, a hearing was held on June 6, 1973. Administrative Law Judge Mesch issued his decision of November 28, 1973, declaring the Ute Park No. 2 claim null and void, but dismissing the complaint against the Ute Park No. 1 claim, although he failed to find that the claim was valid. The contestees have not appealed the Judge's finding that the Ute Park No. 2 claim is invalid. Therefore, the decision became final as to that claim. However, both the contestant and contestees have appealed from the Judge's refusal to make a finding on the validity of the Ute Park No. 1 claim as to discovery of a valuable mineral deposit. Both contend basically that although the Judge correctly stated applicable standards to determine discovery, his application of the law to the facts was incorrect.

[1] Contestees concede that the material for which the Ute Park No. 1 claim is allegedly valuable, a gravel, is a common variety of gravel. The claim was located on April 4, 1955 (Tr. 47). This was prior to the Surface Resources Act of July 23, 1955. Section 3 of that Act, 30 U.S.C. § 611 (1970), declared that common varieties of sand and gravel and certain other materials are not valuable mineral deposits under the mining laws (30 U.S.C. § 22 et seq. (1970)); Coleman v. United States, 390 U.S. 599 (1968). In order for a mining claim for a common variety of sand or gravel located prior to the Act of July 23, 1955, to be sustained as a

claim validated by a discovery, the prudent man-marketability test of discovery of a valuable mineral deposit must have been met at the time of the Act, Barrows v. Hickel, 447 F.2d 80, 82 (9th Cir. 1971); Palmer v. Dredge Corp., 398 F.2d 791, 795 (9th Cir. 1968), cert. denied, 393 U.S. 1066 (1969), and reasonably continuously thereafter. State of California v. Doria Mining & Engineering Corp., 17 IBLA 380 (1974).

[2] The prudent man test requires that there must be a showing of minerals in sufficient quantity that:

> * * * a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine * * *.

Castle v. Womble, 19 L.D. 455, 457 (1894), approved in Chrisman v. Miller, 197 U.S. 313, 322 (1905). Especially as to materials in common abundance as sand and gravel, this Department has long required special evidence in addition to a showing of a quantity of mineralization. Thus, it was stated in an Acting Solicitor's Opinion, 54 I.D. 294, 296 (1933):

> * * * [T]he mineral locator or applicant, to justify his possession, must show that by reason of accessibility, bona fides in development, proximity to market, existence of present demand, and other

> factors, the deposit is of such value that it can be mined, removed and disposed of at a profit. * * *

These additional criteria -- the marketability at a profit test -- were approved in Foster v. Seaton, 271 F.2d 836, 838 (D.C. Cir. 1959), and recognized in Verrue v. United States, 457 F.2d 1202 (9th Cir. 1972). The marketability test is a refinement of the prudent man test. Coleman v. United States, supra at 603.

The contentions by the contestant and the contestees go to the vital question of whether the prudent man-marketability test was met as of July 23, 1955, and thereafter. Both object to the Judge's refusal to make a finding on whether the Ute Park No. 1 claim is valid because of a discovery or invalid because of lack of a discovery. The Judge recognized that proof of nondevelopment and a lack of sales from a mining claim before July 23, 1955, give rise to a presumption that the material from the claim was not marketable at a profit at that time, and held that the Government had established a prima facie case of nondiscovery of a valuable mineral deposit by applying this presumption, citing United States v. Clear Gravel Enterprises, Inc., 2 IBLA 285 (1971), aff'd per curiam, No. 72-2396, 9th Cir., October 9, 1974; rehearing denied January 13, 1975; United States v. Humboldt Placer Mining Co., 8 IBLA 407, 79 I.D. 709 (1972), appeal pending, Civ. No. S-2755, D. Cal; United States v. Harenberg, 11 IBLA 153 (1973); United States v. Block, 12 IBLA

393 (1973). Nevertheless, he also ruled that the Government had failed to make a prima facie case as to the quantity and quality of the gravel upon the claim. He also indicated that opinion testimony of contestees' witness, Frank Washam, who had been in the sand and gravel business from 1952 to 1972, that the contestees could have marketed the material from the claims, negated the prima facie case. He concluded, however, that the contestees had not presented:

> * * * sufficiently detailed evidence to support the conclusion that a person of ordinary prudence would have been justified in working the property prior to July 23, 1955, with a reasonable prospect of success in developing a valuable mine. A reasonable prudent person would certainly have to have more information than that presented by the contestees in order to reach a rational decision as to whether the market and other factors were such as to warrant the development of the property. The state of the record is such that no reasonable conclusion can be reached either way on the question of whether a valid discovery of a valuable mineral deposit was made on the Ute Park No. 1 claim prior to July 23, 1955.

He dismissed the contest complaint but refused to rule that the claim was valid by reason of a discovery.

The contestees assert generally that the evidence was sufficient to find that the claim was and is valid because of a discovery, and that they are entitled to a ruling to that effect. In the alternative, they request an affirmance of the Judge's decision

to the extent he found they presented adequate evidence to rebut the Government's prima facie case, even though they recognize the Government could bring another contest against the claim. The contestant, on the other hand, contends generally that the Judge erred in ruling that the Government failed to make a prima facie case in certain respects, in ruling that contestees' evidence was sufficient to negate the prima facie case and, in any event, in refusing to make a ruling one way or the other on whether the claim was validated by a discovery.

Where a record is unsatisfactory on the basic issue of discovery-marketability, this Board in a few circumstances has ordered a further hearing in order to make an informed determination. E.g., United States v. Ideal Cement Co., 5 IBLA 235, 79 I.D. 117 (1972), appeal pending, Ideal Basic Industries, Inc., v. Morton, Civ. No. J-12-72, D. Alas.; United States v. Kosanke Sand Corp. (On Reconsideration), 12 IBLA 282, 80 I.D. 538 (1973); United States v. Wells, 11 IBLA 253 (1973). See also United States v. DeZan, A-30515 (July 1, 1968).

[3] While a case is still within the jurisdiction of an Administrative Law Judge, it is within his authority also to reopen a hearing for the production of further evidence before he makes his decision in the matter. See Isbrandtsen Co., Inc. v. United States, 96 F. Supp. 883, 892 (S.D. N.Y. 1951), aff'd per curiam, 342 U.S.

950 (1952); United States v. King, A-30867 (February 28, 1968). This discretionary authority, however, should be exercised carefully so that a case is not drawn on beyond reasonable lengths of time, and so that the parties are not required to go to unreasonable efforts in presenting their cases. There should also be a reasonable basis for concluding that a further hearing will be productive of the desired additional information before reopening the evidentiary proceedings. Cf. United States v. Haas, A-30654 (February 16, 1967); United States v. Riesing, A-30474 (January 18, 1966).

The Judge did not order a further hearing in this case, although he found the evidence unsatisfactory on the discovery issue. Neither party has requested a further hearing nor has made an offer of proof of additional evidence. On the contrary, both have requested that a ruling be made one way or the other on the unresolved issue. Therefore, we shall not, on our own accord, order a further hearing.

[4] The Judge's action in failing to rule on the discovery issue raises questions relating to the burden of proof in a Government contest. By locating a mining claim and alleging a discovery of a valuable mineral deposit therein, a mining claimant is asserting a superior right and title to the land over the United States. He is the true proponent of a rule or order that he has complied with the mining laws entitling him to possession of the claim.

Consequently, the ultimate burden of proving discovery is always upon the mining claimant. United States v. Springer, 491 F.2d 239, 242 (9th Cir. 1974), cert. denied, __ U.S. __, 95 S. Ct. 60 (1974); Foster v. Seaton, supra. When the Government contests the claim it has only the burden of going forward with sufficient evidence to make a prima facie case of lack of discovery and then the affirmative burden of disproving the Government's case by a preponderance of the evidence devolves upon the claimant. Id. We shall point out the consequences of the burden of proof in certain situations and the duty of the Judge, or this Board, in such circumstances.

If the Government fails to present a prima facie case, a contestee by timely motion may move to have the case dismissed and then rest. The contest complaint would then properly be dismissed because there was no prima facie case making an evidentiary basis for an order of invalidity by lack of discovery, and no other evidence in the record to support the charges in the complaint. Cf. United States v. Winters, 2 IBLA 329, 339-40, 78 I.D. 193, 197 (1971).

[5] If, however, the contestees go forward, even after filing a motion to dismiss, and present their evidence, that evidence must be considered as part of the entire evidentiary record and weighed in accordance with its probative values. Therefore, even if the

Government has failed to make a satisfactory prima facie case, or if its case is weak, evidence presented by contestees which supports the Government's contest charges may be used against the contestees, regardless of the defects in the Government's case. United States v. Melluzzo, 76 I.D. 181, 188 (1969); 1/ United States v. Foster, 65 I.D. 1, 11 (1958), aff'd, Foster v. Seaton, supra.

[6] Where evidence has been presented on an issue and the Judge does not order a further hearing to resolve factual uncertainties on that issue, those uncertainties, or doubts, must be resolved against the party having the ultimate burden of proof on the issue, the party bearing the risk of nonpersuasion. Thus, if the party having the risk of nonpersuasion does not present sufficient evidence to sustain his burden, he must suffer the consequences of his failure; namely, a ruling against him on the issue upon which there is doubt. See Marcum v. United States, 452 F.2d 36 (5th Cir. 1971); Johnson v. Barton, 251 F. Supp. 474 (W.D. Va. 1966). The application of the burden of proof is to forestall unresolved decisions where evidence has been presented but there are doubts or uncertainties remaining. Therefore, where the Government has made a prima facie case of lack of discovery, any doubt on the issue of discovery raised by the evidence must be resolved against the mining claimant, who bears the risk of nonpersuasion. The Administrative

1/ Set aside for other reasons, Frank Melluzzo, 1 IBLA 37 (1970).

Law Judge has a duty to make findings of fact and conclusions of law on the factual and legal issues raised in a contest. See 5 U.S.C. §§ 556(c)(8), 557 (1970). Where the claimant has failed to meet his burden of proof on discovery, the Judge must find that there has not been a discovery. Foster v. Seaton, supra. Such a finding impels the conclusion that the claim is invalid, as discovery is a sine qua non of a claim's validity.

[7] Where, however, the contestees' evidence preponderates sufficiently to overcome the Government's prima facie case on an issue raised by the evidence, the contest should be dismissed and a ruling on the issue made by the Judge. For example, if the Government's prima facie case consisted of evidence that a common variety of material was not marketable as of July 23, 1955, and the contestees' evidence preponderated that it was marketable then, the Judge should so rule and dismiss the contest where there is no evidence as to present marketability of the material. The issue of present marketability not having been raised by the evidence could not be decided, but there would be a ruling that would establish that a prerequisite to the claim's validity, i.e., marketability as of the cutoff date of July 23, 1955, was met.

The foregoing paragraph assumes that a patent application has not been filed. If a patent application has been filed, it is

essential for this Department to determine whether all the requisites of the law have been met before patent may issue. If there has not been evidence presented on an essential issue, or issues, dismissal of the contest will not fulfill this Department's obligation to act "to the end that valid claims may be recognized, invalid ones eliminated, and the rights of the public preserved." Cameron v. United States, 252 U.S. 450, 460 (1920). Therefore, in a patent proceeding, it would be essential to order a further hearing to make a proper determination on the essential issues.

In the case at hand, the Judge concluded that a prima facie case had been presented that the material from the claim was not marketable in 1955, because of the presumption arising from lack of development and sales of material from the claim. The affirmative burden was thus upon the contestees to show that the material was marketable at a profit in 1955. We agree with both parties that in the circumstances of this case the Judge should have ruled on the discovery-marketability issue. He found that the state of the record is such that no reasonable conclusion can be reached either way on the question of marketability prior to July 23, 1955. This issue must be resolved. The Judge erred by not invoking the consequences of the contestees' failure to sustain their burden of proof -- risk of nonpersuasion -- once he found the evidence in equipoise, and that there was insufficient evidence to establish marketability. His

decision is subject to reversal because of this error alone. 2/ We also note that he erred in statements to the effect it was unnecessary to consider the contestees' evidence on quantity and quality of the material because the Government did not make a prima facie case that the material was not of sufficient quantity and quality, as all evidence in the record going to matters in issue relative to the discovery test must be considered. Id.

We shall now consider contestees' contention that the claim is valid because the evidence satisfactorily shows a discovery, and related issues raised by both parties.

Much of the Judge's decision criticized the Government's prima facie case. Some of this criticism is misplaced because it would place an impossible burden upon the Government to present evidence to negate all possible aspects of the marketability

2/ The consequence of the failure of the claimant to satisfy his burden of proof is akin to the determination made in United States v. Carlile, 67 I.D. 417, 427 (1960), that:

"[W]here in a contest against a mining claim it is found that a valid discovery has not been made, it necessarily follows that the claim is invalid, or null and void, without regard to whether the contest was brought as the result of an application for patent or in the absence of an application for patent."

This position has been restated by this Board, United States v. Bartels, 6 IBLA 124 (1972). While Carlile dealt explicitly with the form of the order to be issued after a contest hearing and the legal consequence of a finding of no discovery, it clearly demonstrates that when it is determined a discovery has not been made the claim must be declared null and void and cannot be suspended in a legal limbo.

discovery test. If the Government showed that one essential criterion of the test was not met, this was sufficient to establish a prima facie case. Such evidence was presented here. The mining engineer witness for the Government in this case testified concerning his examinations of the claim in 1969, 1970, and in 1971 (Tr. 9, 14-17). He observed there had been no removal of materials from the claim other than minor amounts which he believed due to assessment work (Tr. 15). He indicated the only workings on the claim were made around 1969 and in 1972. He met with the contestees and discussed whether they had satisfactorily established a market prior to July 23, 1955 (Tr. 17). He offered his opinion, based upon his examinations of the claim and discussions with the claimants, that a prudent man would not be justified in spending time and money in the hopes of developing a valuable mine because a market was not established prior to July 23, 1955 (Tr. 19).

The Government's expert witness's opinion was based upon an adequate investigation of the claim. It is supportable, and sufficient to establish a prima facie case that there was no discovery. United States v. Winters, supra.

[8] To emphasize, in making a prima facie case, it was only essential for the mineral examiner to establish that the claimant had not prior to July 23, 1955, in fact, met the criteria used in determining marketability. It is not essential that the testimony

prove conclusively that the material could not be marketed at a profit. The examiner's failure to testify about specific prices, costs, and certain other aspects of the market place at that time would be harmful to the Government's case only if such information was essential in order to rebut the contestees' showing of marketability. If the contestees fail to show that the criteria of the marketability test have been satisfied before the critical time and thereafter, it would not be essential to show more specific evidence as to the market conditions. 3/ Also, it is not a Government mineral examiner who is required to do the discovery work upon a claim. United States v. Coston, A-30835 (February 23, 1968). It is only necessary that he examine the exposed areas of a claim and the workings on a claim to verify if a discovery has been made by a mining claimant. United States v. McGuire, 4 IBLA 307 (1972); United States v. Laing, 3 IBLA 108 (1971); United States v. Gould, A-30990 (May 7, 1969); United States v. Smith, A-30888 (March 29, 1968); United States v. Swain, A-30926 (December 30, 1968).

Furthermore, it is evident from the mineral examiner's testimony that there had been no material sold from the claim prior to July 23,

3/ This is not to say that the Government could not introduce such evidence in making a prima facie case, or in rebuttal. Indeed, a stronger case would be made by doing so. Three cases illustrate the risks in the Government's failure to present specific rebuttal evidence regarding market place conditions where contestees offered opinion and other evidence on marketability: Verrue v. United States, 457 F.2d 1202 (9th Cir. 1972); United States v. Gibbs, 13 IBLA 382 (1973); United States v. Harenberg, 9 IBLA 77 (1973). But compare these with United States v. Block, 12 IBLA 393 (1973).

1955, nor since that time. The evidence also showed there had been no development of the claim. These facts raise the presumption that the material was not marketable. Osborne v. Hammit, 377 F. Supp. 977 (D. Nev. 1964).

Appellants contend, however, that their evidence overrides this presumption. Their evidence shows the following: only some spade work had been done on the claim at the time of location (Tr. 60); and no drill tests were made until 1958 (Tr. 56), which tests would be necessary in order to ascertain whether there was sufficient quantity of the material on the claim to develop a mine. (See testimony by contestees' engineer, Tr. 71-76.) Also, claimant's engineer estimated there were 2 1/2 million yards of gravel on the claim, but this estimate was based upon the drill test data obtained from 1958 to 1965 (Tr. 73, Ex. A). Contestee Gerald O'Connor testified that he signed a lease in May of 1955 with a representative of two construction firms for sand and gravel at a royalty of 7 1/2 cents per ton, with a guaranteed minimum of $2,500 per year (Tr. 48-49). The lessee, however, never paid any money, never did any work on the claims, did not remove any material therefrom, and after two years the lease was terminated (Tr. 50). A copy of the lease was not introduced into evidence (Tr. 49) and, therefore, all of the obligations of the parties to the lease are unknown.

O'Connor testified that in 1955 he was not familiar with the price of common variety of rocks and therefore felt the 7 1/2 cents a ton provided by the lease was satisfactory but later figured it was too cheap (Tr. 64). Although he offered a general opinion that he probably could have sold gravel from the claim at a profit, his entire testimony destroys this broad conjecture. Rather, it supports the conclusion that the local market was too spotty and too irregular to support a sand and gravel operation. He turned down an offer around 1955 because the price was too low (Tr. 52, 54), and did not develop other local market potentials because the possible sales would be too discontinuous and small to allow for steady production and a realistic profit (Tr. 64, 67-68).

[9] Also, the testimony indicates that much of this sporadic market was for use of the material as fill, base and landscaping, which the Department has held not to be validating uses. United States v. Bienick, 14 IBLA 290 (1974); United States v. Kottinger, 14 IBLA 10, 16-17 (1973); United States v. Barrows, 76, I.D. 299, 306 (1969), aff'd, Barrows v. Hickel, 447 F.2d 80 (9th Cir. 1971); United States v. Hinde, A-30634 (July 9, 1968).

O'Connor was not in 1955 or thereafter in the sand and gravel business; he runs a service station (Tr. 56). The essence of his testimony as to why he did nothing further with the claim is that

he wanted to wait and hold the material until it could be sold at a higher price, believing that inflation would increase and that the nearby city of Colorado Springs would grow and increase the demand (Tr. 67-68). This same rationale was given by another witness for contestees, Mr. Frank Washam, who had been in the sand and gravel business from 1950 to 1972. He also gave a broad opinion that the material could have been marketed at a profit in 1955. However, his more specific testimony shows that this is a very optimistic opinion. Indeed, he indicated he would not have operated from the claims at that time because he had sources nearer to Colorado Springs. He indicated that there were no substantial pits in operation in the area of the claims in 1955, that small users could get their supply from road cuts in the area, and that in 1956 there were only two large pits near the city of Colorado springs (Tr. 86). His testimony supports a conclusion that the market demand for material has increased recently as gravel pits near Colorado Springs have become exhausted and also because of the growth of that city and mountain communities near the claim (Tr. 94, 100). From his testimony it is apparent that because of the increased costs for hauling the material, the contestees could not have successfully competed in the larger Colorado Springs market area until closer sources were exhausted (Tr. 89, 95).

Although Mr. Washam gave his opinion that the contestees could have sold an average of 500,000 tons of material a year from 1955

to 1965 (Tr. 90), the support for this opinion is lacking. In making this opinion, also, he did not distinguish between uses of the materials recognized under the mining laws before 1955 and other uses. The possibility that material could be sold for purposes which ordinary earth may be used, such as fill, may not be considered in determining the marketability of a common variety of sand and gravel because such purposes were not validating uses recognizable under the mining laws even prior to the Surface Resources Act. United States v. Barrows, supra; United States v. Bienick, supra.

Contestees contend that their evidence meets all of the criteria of the marketability test set forth in United States v. Harenberg, 9 IBLA 77 (1973), and United States v. Gibbs, 13 IBLA 382 (1973), where there had been development on other nearby or adjoining claims, but no development on the particular claims involved. They contend that in those cases witnesses of the claimants stated they were holding the materials in reserve for reasons that had nothing to do with marketability but, rather, concerned their own lack of "economic necessity" to develop the claims. They contend that as O'Connor was running a service station, he had no financial need to develop this claim and the same rationale should be applicable here. They also assert that although Rocky Mountain Paving Company, Washam's company, was satisfying the market need at the time, this indicates there was a market demand and the fact

it was being well supplied by others does not matter under the Gibbs rationale.

We must reject these contentions. We need not examine the rationale in those cases because, despite the broad dictum in Gibbs and Harenberg, the facts of those cases are distinguishable from those here. Furthermore, the implication drawn by contestees that the criteria of bona fides in development and present demand for the material from the claim are no longer necessary since Harenberg, Gibbs, and also, Verrue v. United States, supra, is not true. The Department in Harenberg and Gibbs, and the Court in Verrue, recognized the marketability standards and burden of proof set forth in Foster v. Seaton, supra. As they did not purport to change the standards, none of the marketability standards and burden of proof requirements have been changed. Those standards and requirements are well-founded.

Of particular interest on the issues of present specific demand for the material from the claim and bona fides in development is the most recent pronouncement of the United States Court of Appeals for the Ninth Circuit in Clear Gravel Enterprises, Inc. v. Nolan Keil et al., No. 72-2396 (filed October 9, 1974), aff'g, United States v. Clear Gravel Enterprises, Inc., 2 IBLA 285 (1971). The Court

in Clear Gravel at 2 and 3 stated with respect to sand and gravel claims:

> While the marketability of the mineral could have been demonstrated by the Appellant by a showing of its accessibility, its proximity to the market, the demand for it and by the Appellant's bona fide efforts to develop the claims and compete in the market with the product extracted from those claims, nonetheless, the record demonstrates that Appellant's evidence fell far short of the required showing. Instead, the evidence indicates that although Appellant had between 1952 and no later than 1956 leased all sixteen claims to the second largest sand and gravel-producing company in the area, that company had mined but one of those claims, and the one being mined was neither of the two claims here involved. Other evidence produced at the time of the hearing before the Hearings Examiner further demonstrated that the one mine being operated provided sufficient sand and gravel to meet the needs of the market and that it could yield a sufficient quantity of sand and gravel to provide for any increased share of the market to its producer.
>
> A government geologist testified that he had inspected the claims and that in his opinion, the sand and gravel could not be extracted, removed and marketed at a profit as of July 23, 1955. A government valuation engineer examined the claims, and because a 1955 market had not been demonstrated for the materials on the claims, he, too, reached the same conclusion as the geologist.
>
> Of particular significance is the obvious fact appearing from the record that the quantity of Appellant's other sand and gravel holdings in the area, when combined with the state of the market, were such as to deter the Appellant from expending money and effort to extract and market the sand and gravel from the claims in question from the time of location in 1946 until approximately 1963. In fact, the lack of development

> of the claims were such that as of July 23, 1955, the Appellant had not even constructed a road to them.
>
> Based upon the record before it, we conclude that the District Court was correct in dismissing the action by way of Summary Judgment. [Emphasis added].

The Court's decision in Clear Gravel is in full accord with the rationale of the court in Osborne v. Hammit, supra, regarding the credibility of opinion evidence on the marketability of common variety sand and gravel deposits. Similarly, there is not credible evidence in the present case.

The contestees' evidence to show a demand for the material as of July 23, 1955, is not satisfactory, as the Judge, indeed, concluded. O'Connor's testimony of the lease arrangements does not establish a demand for the material. The failure to present a copy of the lease limits any weight such lease might be accorded in demonstrating a demand for the material. United States v. Block, 12 IBLA 393 (1973). If anything, the fact nothing was done by the lessee tends to support an inference that it was not marketable at that time, rather than the converse being true. This is reinforced by the fact nothing further was done with the claim, other than a few drill holes made in 1958, until 1968 and 1969, when O'Connor testified he found a buyer for the claim, the Colorado Excavating Company, which was going to open a cut until the

Forest Supervisor stopped the contestees from going ahead (Tr. 55). Thus, except for a few drill holes and other assessment work, the claim lay idle for some 13 to 14 years after common varieties were declared to be no longer a valuable mineral deposit under the mining laws.

Furthermore, to establish that the claimant was in a position to market material from the claim prior to July 23, 1955, he would have to know whether the material was salable. This would include information that it was of a marketable quality and in a quantity sufficient to warrant development expenses, as well as other pertinent information regarding the marketplace. Such information was not known in 1955 as evidenced from O'Connor's testimony showing his lack of knowledge of market conditions at that time, and also because no testing or drill holes of the material from the claims had been made at that time.

The claimant -- not the Government's examiner -- must ascertain by workings, drill tests, and the like on the claim, prior to July 23, 1955, that the quantity of sand and gravel on a claim was sufficient to persuade a prudent man to expend his labor and means, with a reasonable prospect of developing a valuable sand and gravel operation. United States v. Henrikson, 70 I.D. 212, 216-17 (1963), aff'd, Henrikson v. Udall, 350 F.2d 949 (9th Cir. 1965), cert. denied,

384 U.S. 940 (1966). In Henrikson it was not sufficient that drill tests and workings had established a sufficient quantity of sand and gravel on an adjoining claim, when there were no such tests or workings on a claim declared invalid for failure to meet the prudent man-marketability test. Because the contestees in the present case had likewise failed to establish the necessary information upon which a prudent man could determine the character of the deposit by July 23, 1955, the prudent man test was not satisfied at that time.

[10] We find no support for contestees' contention that the claim could be recognized as being held for a reserve. In effect, contestees are trying to put the proverbial cart before the horse. The "reserve rule" limits the amount of mineral land deemed valuable by a discovery. It cannot come into operation until a discovery has been established. United States v. Stewart, 5 IBLA 39, 55 79 I.D. 27, 34-35 (1972). It is not, therefore, a substitute for discovery. All of the criteria of discovery, including the marketability criteria for sand and gravel deposits, must be satisfied prior to July 23, 1955, for a common variety of sand and gravel, before the reserve issue may even be considered. Id. Such criteria have not been satisfied in this case.

Although contestees have now shown that the gravel is in a quantity and quality that may meet marketable criteria for certain

uses, this was not established by them until years after 1955. Thus, in 1955, they did not have sufficient information to know whether the material could be used in the future for recognizable purposes. Likewise, they had no business in 1955 for which they needed to hold a reserve, nor have they ever been in the sand and gravel business. O'Connor apparently had not investigated market prices in 1955. The contestees' nondevelopment of the claims was not because they were extracting and selling other materials, but because O'Connor wanted to wait to see if the price for material would rise and because he was not assured of a continuous demand for the material. While in hindsight, as a practical matter, it may have been prudent for someone to hold material until closer sources to the market were exhausted, in 1955 this hope of future potential profitable sales was speculative. A mining claimant's desire in 1955 to hold a claim for speculative purposes in the hope that a future market will develop to warrant development of the claim does not satisfy the marketability test. Barrows v. Hickel, 447 F.2d 80 (9th Cir. 1971).

[11] The general opinion testimony on the possibility of a claimant's ability to market the material from the claim is contradicted by the more specific testimony which tends to show that development of the claims in 1955 was not warranted under the market place conditions at that time and, therefore, it is not credible

evidence. See Osborne v. Hammit, supra. To stretch the prudent man-marketability test to cover such facts would completely negate the clear intention of Congress by the Act of July 23, 1955, to close common varieties of sand and gravel and certain other materials to location under the mining laws, and make them disposable only by sale under the Materials Act (30 U.S.C. § 601 (1970)). Coleman v. United States, supra. To accept the unsupported conjectural opinion that a person could have profitably marketed the material from these claims in 1955, as credible evidence and a preponderating establishment of the fact of marketability in this case, would make it impossible to refute the supposed fact and would, in effect, transfer the risk of nonpersuasion from the mining claimant to the Government. It would also destroy the safeguards of the marketability test set forth in the Acting Solicitor's opinion quoted, supra, and in Foster v. Seaton, supra, to assure that claims for common varieties of materials found in wide abundance will be developed for mining purposes and not for other purposes. We cannot ascribe to any such erosion of the marketability test.

Contestees had not established the character of the deposit in 1955. It is also evident from the credible evidence in this case, that the additional criteria of the marketability test were not satisfied as there was no bona fides in development, there was no showing of a present demand for the materials from the claim in 1955,

the claim was not well situated to the larger market area at that time and the closer, local market was sporadic and would not serve to make a profitable operation. Despite conditions now, the prudent man-marketability test was not satisfied as of July 23, 1955, as required to sustain the claim, and it must be declared invalid.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is reversed, and the Ute Park No. 1 mining claim is declared null and void.

Joan B. Thompson
Administrative Judge

I concur:

Martin Ritvo
Administrative Judge

ADMINISTRATIVE JUDGE STUEBING CONCURRING:

While not in full accord with every statement made in the majority opinion, I agree generally with the rationale and the result. The purpose of this separate opinion is not to delineate my differences with the majority opinion, but rather to express the basis for my concurring therein.

First, the Administrative Law Judge recognized that the contestant's evidence showing there was no mineral development or sale of materials from the claim raised a presumption that there was no market, and that this was sufficient to establish a prima facie case. United States v. Gibbs, 13 IBLA 382 (1973). In light of this, I believe that the Judge devoted entirely too much concern and emphasis to his finding that the contestant failed to make a prima facie case which related directly to the quantity and quality of the gravel on the claim. It is only incumbent on the contestant to make one prima facie case, which the contestant succeeded in doing by raising the presumption that the material was not marketable on the critical date. The nonmarketability thus shown need not relate to the quantity or quality of the gravel. It could have to do with the absence of a demand, see United States v. Bartlett, 2 IBLA 274, 78 I.D. 173 (1971); or some physical element which would make mining costs prohibitive, United States v. McCall, 7 IBLA 21, 79 I.D. 457 (1972);

or because longer hauling costs make the material noncompetitive, as in United States v. McCall, 1 IBLA 115, 119 (1970). Therefore, the contestant was under no obligation to supply evidence that the quality of the gravel was sub-standard or that the quantity was insufficient on the Ute Park No. 1 claim. The contestant might even have adduced evidence that the quantity and quality were exceptionally good without destroying the prima facie case that the material was nevertheless non-marketable on the critical date. The contestant having made a prima facie case, it then devolved upon the contestees to rebut that case by a persuasive showing that material from the claim could have been marketed at a profit on the critical date and that such marketability has continued without substantial interruption. If the contestees had succeeded in this, they would have been entitled to a finding that their claim was valid. Having failed in this, however, the claim must be held invalid. There is no way to avoid a determination of the issues presented where all of the available evidence going to the merits of those issues has been fully and fairly heard. 1/

1/ It is possible to hypothesize a situation in which a mining claim contest could be properly dismissed without a ruling on the issues after the contestant had offered an apparent prima facie case. For example, if the prima facie case of "no discovery" consisted exclusively of the testimony of contestant's expert witness that he had examined the claim on a certain date, made specific observations and formed an expert opinion based thereon, that opinion and the prima facie case could be rebutted by the contestee's showing that on the date in question the contestee's witness had been off on a frolic and detour of his own, that he had never examined the claim at all, and that his entire testimony was perjured. Having established only this

The crux of the Judge's error lies in the following quotation from the decision:

> While the contestees have destroyed the inference that the gravel could not have been marketed at a profit in 1955, they have not presented sufficiently detailed evidence to support the conclusion that a person of ordinary prudence would have been justified in working the property prior to July 23, 1955, with a reasonable prospect of success in developing a valuable mine. A reasonable prudent person would certainly have to have more information than that presented by the contestees in order to reach a rational decision as to whether the market and other factors were such as to warrant the development of the property. (Emphasis added).
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> Dec. p. 12.

Where a prima facie case of invalidity has been made by raising a presumption that the material was not marketable at a profit on the critical date, that presumption can only be "destroyed" by a preponderance of evidence which establishes that the material was in fact marketable then. The procedural and evidentiary rules which govern contests must not be so construed that nothing can be decided after all the evidence of both sides has been presented, because

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(fn.1, cont.)
and nothing more, the contestee would, upon a proper motion, be entitled to a summary dismissal of the contest without any ruling as to the issues relating to the merits of the claim. Of course, such a dismissal would be without prejudice to the Government's right to bring another action to test the validity of the claim. The distinction between the hypothetical case and the one at bar lies in the fact that where the contestee attempts to rebut the prima facie case on the merits of the claim, it can only do so by a preponderance of countervailing evidence.

such a result converts a quasi-judicial proceeding into an exercise in futility. The trier of fact must allow himself to be persuaded that one side or the other has prevailed, or else nothing has been accomplished.

The answer is suggested by the underscored sentence in the above quotation from the Judge's opinion. If, as the Judge found, the contestees did not have enough information about the gravel deposit on which they could have based a reasonable, rational and prudent decision to proceed with development of the property, they cannot be said at that time to have "discovered" a valuable deposit.

Certain knowledge of the mineral and its economic worth is inherent in the act of "discovering" a "valuable deposit" of that mineral. This includes a recognition of the mineral, a general appreciation of its uses, and a sufficient understanding of the economics of exploiting the mineral as would enable the finder to make an informed preliminary judgment as to whether the deposit is economically valuable or not. One who merely stakes out a mining claim on speculation, without knowing what the land contains, or with no comprehension of whether the located deposit is economically "valuable," as required by statute, can hardly be said to have "discovered" a valuable mineral deposit as of that date, even though at some later time it is learned that a valuable mineral deposit actually does exist within

the limits of the claim. In determining whether a mining claim has been validated by a discovery of a valuable mineral deposit, each case must be examined on its own facts by applying the prudent man test, which includes a consideration of economic factors upon which a prudent man's expectation of developing a valuable mine would be based. United States v. Hines Gilbert Gold Mines Co., 1 IBLA 296 (1971).

In the instant case the Administrative Law Judge concluded that on July 23, 1955, the contestees lacked the basic information essential to a prudent man's formulation of an expectation of developing a valuable mine. On that basis alone he should have held that they had not effected a discovery and that the claim is invalid.

Additionally, in his recapitulation of the evidence the Judge made the following analysis:

> The above testimony would seem to indicate that, while there might have been some market for the material in 1955, the market was not such as to warrant a person of ordinary prudence in proceeding with the development of the claim. It appears, however, that the mining claimant, who runs a garage and service station, was not, at that time, particularly familiar with the market conditions; that he had not made any survey or analysis of the market for the gravel from the claim; and that he was expressing opinions as to marketability and profitability on the basis of limited information gained from a few individuals who had contacted him on an occasional basis in an effort to purchase gravel. (Emphasis added.)
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> Dec., p. 10.

This, too, would seem to compel a conclusion that the market in 1955 was not such as would reasonably support development of the claim, and that the claimant's opinion to the contrary was premised on inadequate information.

Moreover, as noted in the majority opinion, O'Connor testified that he was holding the claim in the belief that inflation would make it more valuable and in anticipation that the growth of the City of Colorado Springs would have the same effect. He also testified that he made no attempt to sell material to the Highway Department in 1955 "* * * because we was waiting for the highways to be changed, which we knew was coming in the future * * *" (Tr. 65, 66). This speculation on the future growth of a nearby city and upon future highway construction in the area brings the case into close kinship with United States v. Isbell Construction Co., 4 IBLA 205, 78 I.D. 385, 395 (1971). In that case we held that a sand and gravel claim could not be treated as valid on July 23, 1955, where it had no viable market, but was being held in anticipation that community expansion would eventually create a market and reduce hauling costs so that future development would be feasible.

The strongest testimony on behalf of the claimants was presented by Frank O. Washam, who was president of Rocky Mountain Paving Company, of Colorado Springs, in 1955. He stated that it was his opinion that

the claimants could have sold material from the claim at a profit in 1955. This, of course is the sine qua non in the determination of the validity of any claim located prior to July 23, 1955, for a common variety of mineral. United States v. Gibbs, supra, and cases cited therein. However, upon analysis, it does not appear that Washam's opinion was formed on the basis of any authoritative knowledge of a substantial market which actually existed for this material in 1955. His own company, Rocky Mountain Paving, was a user of great quantities of gravel, and in 1955, he said, his company was the only asphalt paving plant in the city (Tr. 86), that they had a monopoly for several years (Tr. 99), but that in 1955 he would not have used gravel from the Ute Park claims even if he owned them, because, "I would not have hauled it that far in 1955, until closer deposits were depleted." (Tr. 95.) Washam felt that if the claimants had set up a screening plant and created a stockpile of gravel they could have sold considerable quantities to small users (Tr. 89), indicating that it would be purchased by various users such as householders, motels (to gravel parking lots) and for streets and landscaping (Tr. 90). However, much of his estimate of the available market in 1955 was so speculative that it must be discounted altogether, e.g., "A community such as Green Mountain Falls might have been graveling a lot of streets, and would have brought a considerable quantity * * *". As to the market demand created by gravel use by the State, the question was premised as follows: "Now if the State of Colorado wished to procure

gravel, and we don't know whether they did or not * * * do you believe this gravel would be competitive * * *?" He named several communities in the vicinity of the claims which might have afforded a market, but on cross examination he conceded that he didn't know what their populations were in 1955, except that they were "much less than today" (Tr. 98); that Green Mountain Falls was "very small," and he described all of these communities as "villages." (Tr. 99.) He testified that his company sold sand and gravel in these villages, but he did not indicate any quantity (Tr. 99). He also acknowledged that "a lot" of small users in that area simply could go and pick up gravel off the National Forest, and did so (Tr. 100).

In short, Washam's testimony failed to point out the existence of any market demand in the area of such dimension as would have justified development of the Ute Park No. 1 claim between the time it was located on April 4, 1955, and the enactment of P.L. 167 on July 23, 1955. Here, again, there is a marked similarity with the factual situtation which obtained in United States v. Isbell Construction Co., supra at 226, 78 I.D. 396.

The contestee-appellants, in their statement of reasons for appeal, make repeated references to United States v. Gibbs, supra, and United States v. Harenberg, supra, in an effort to bring this case within the ambit of those decisions. As the author of the majority opinion

in both Gibbs and Harenberg I feel particularly well qualified to draw the distinctions between those cases and this one.

In both Harenberg and Gibbs the evidence that the claimants could have profitably mined their respective claims in 1955 was factual evidence of conditions actually prevailing at that time. By contrast, the evidence offered by the contestees in this case was, to a large extent, speculation that if certain conditions had prevailed in 1955, these would have afforded a market into which the claimants might have been able to dispose of their material at a profit. Testimony that if the State had then wished to procure gravel in the area profitable sales could have been made, or that a nearby community might have been graveling a lot of streets does nothing to establish that a profitable market actually existed. The testimony that homeowners and other small volume users in the immediate vicinity would have purchased the material in 1955, had it been available, fails to establish that the claimants would have been justified, as prudent men, in expending their labor and means in installing and operating a screening plant on the Ute Park No. 1 claim in the reasonable expectation that sales of small lots of material to such purchasers would have been a profitable venture.

In both Harenberg and Gibbs this Board found that the claims in question constituted a reasonable reserve supply of materials which

the claimants needed for the continuation of their respective businesses on the basis of their foreseeable needs, reasonably projected. This, I submit, is an entirely different circumstance from that where claimants having no connection with the business seek to lock up a resource until such time as the depletion of other supplies make "their" deposits valuable. It is true, as the contestee-appellants assert, that there is nothing in the law which would require the holders of a valid claim to proceed with development rather than wait for the deposit to become more valuable, but the concept of a reserve requires that the claimant be in the business, have more than one source of supply which could be exploited profitably at the time, and that the entire supply be needed to sustain his business operation over a reasonable term of time. Under these conditions a decision to exploit one of his sources while holding the other(s) as a reasonable reserve is within the contemplation of the law.

However, where, as here, the claimants have not demonstrated to the satisfaction of the Administrative Law Judge or to this Board that the claims were valid on the critical date, and they were not engaged in the business of mining and selling the material, their assertion that they were holding the deposit as a reserve supply cannot be brought within the purview of the Harenberg and Gibbs decisions. As stated in Gibbs, "The holding of a mining claim for

future development without present marketability does not impart validity to a claim." (Syllabus).

I share the opinion of the panel majority and the Administrative Law Judge that the claimants failed to show that they could have extracted and sold materials from the Ute Park No. 1 claim at a profit during the period from April 4, 1955, to July 23, 1955, and I conclude, therefore that the claim must be held null and void.

Edward W. Stuebing
Administrative Judge

19 IBLA 52